

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE AMENDING PORTIONS OF THE COUNTY CODE OF REGULATORY ORDINANCES RELATING TO VECTOR CONTROL AND THE PREVENTION AND CONTROL OF EYE GNAT IMPACTS ASSOCIATED WITH COMMERCIAL ORGANIC FARMS

The Board of Supervisors of the County of San Diego ordains as follows:

**Section 1.** Irrigated agriculture, particularly in sandy soils rich in organic matter, can support the development, attraction or harborage of eye gnats. On larger organic farms, where non-organic pesticides cannot be routinely used to control insects, eye gnats can develop in numbers that cause human discomfort in nearby communities. In severe cases, eye gnats can disrupt normal household, school and community activities. There can be significant related economic harm, including decreased property values, loss of tax revenues and impacts on tourism and other businesses. To address eye gnat nuisances where necessary, this ordinance reinstates the classification of eye gnats as “vectors” subject to the County’s Vector Control Program. The incorporated cities in the county have previously consented to a County Vector Control Program broader in scope than the program provided by this ordinance.

To protect organic farming in San Diego County and to maintain consumer access to locally-grown organic produce, this ordinance limits and conditions the exercise of Vector Control Program powers as to eye gnats. It is the policy of the County to assist in resolving significant eye gnat situations through cooperative efforts with farmers, the Farm and Home Advisor, and communities whenever possible. Voluntary efforts by farmers will be supplemented by Vector Control Program efforts to find and abate other significant sources of eye gnats that may be compounding a problem. Where voluntary measures by a farmer combined with any supplemental abatement efforts by the Vector Control Program do not sufficiently mitigate a problem, or where a farmer is uncooperative, it is the policy of the County to require farmers to implement proven measures to mitigate eye gnat impacts that are practicable for their specific operation. However, limitations on organic farming may be necessary if a vector nuisance cannot be resolved in any other way. It is recognized that more research related to eye gnats and eye gnat abatement is necessary to further determine best management practices which are compatible with the operation of organic farms in San Diego County.

This ordinance does not limit the right of any person affected by an agricultural operation that is a nuisance to seek judicial abatement of that nuisance pursuant to the Civil Code.

**Section 2:** Section 64.201 of the San Diego County Code of Regulatory Ordinances (the “County Code”) is amended to read as follows:

## **CHAPTER 2: VECTOR ABATEMENT AND CONTROL**

### **SEC. 64.201. PURPOSE.**

Health and Safety Code (H & S Code) sections 2001 et seq. recognize that California's climate and topography support a wide diversity of biological organisms and that while most of these organisms are beneficial, some are vectors of human disease pathogens or directly cause other human diseases. The Legislature recognized that some of the diseases may be fatal, especially in children and older adults. In order to protect Californians and their communities against the dangers of vector-borne diseases and vector-related public nuisances the Legislature granted broad statutory authority to mosquito abatement and vector control districts. Government Code Section 25842.5 allows a board of supervisors to provide the same services and exercise the powers of a mosquito abatement and vector control district. Pursuant to this statutory authority, the Board of Supervisors resolved to act as a mosquito abatement and vector control district in both the incorporated cities and the unincorporated area of the County. The city council of each incorporated city in the County consented to the Board's resolution. The Board also resolved to delegate implementation and enforcement duties to the Department of Environmental Health. The purpose of this chapter is to establish a program authorized by Government Code section 25842.5 to control and abate mosquitoes and other vectors in San Diego County to protect the public health, safety and welfare of the entire San Diego County community from vector-borne diseases and vector-related public nuisances.

**Section 3:** Section 64.202 of the County Code is amended to read as follows:

### **SEC. 64.202. DEFINITIONS.**

The following definitions shall apply to this chapter:

- (a) “Abate” means to eliminate a public nuisance or to reduce the degree or intensity of a public nuisance.
- (b) “Director” means the Director of the Department of Environmental Health and any other person the Director employs or appoints to implement or enforce this chapter.

(c) “Eye gnat” means a very small fly endemic to the San Diego area with the scientific name *Hippelates spp. or Liohippelates spp. (formerly Hippelates spp.)*

(d) “Hearing officer” means a County hearing officer appointed pursuant to County Administrative Code sections 650 et seq.

(e) “Property” has the same meaning as the term property in Health and Safety Code section 2002(h).

(f) “Property owner” means the person, entity or agency claiming ownership, title or right to property. Where land or water is leased or is made available for use by a person or agency pursuant to a license, right of entry agreement, right of entry permit, or any other similar arrangement, “property owner” includes the lessee or other person or agency legally entitled to use the property or water.

(g) “Public nuisance” means any of the following:

(1) Any property, excluding water, that has been artificially altered from its natural condition so that it now supports the development, attraction or harborage of a vector. The presence of vectors in their development stages on a property is prima facie evidence that the property is a public nuisance.

(2) Any water that is a breeding place for vectors. The presence of vectors in their development stages in the water is prima facie evidence that the water is a public nuisance.

(3) Any activity that supports the development, attraction or harborage of vectors or that facilitates the introduction or spread of vectors.

(h) “Vector” means an animal capable of transmitting the causative agent of human disease. “Vector” also includes eye gnats.

**Section 4.** Section 64.203 of the County Code is amended to read as follows:

**SEC. 64.203. SCOPE AND AUTHORITY.**

(a) Except as provided in subdivision (b) of this section, the Director when acting pursuant to this chapter may exercise the following powers on any property or water located in the unincorporated area of the County or in any incorporated city in the County:

(i) Conduct surveillance programs and other appropriate studies of vectors, vector control methods, and vector-borne diseases.

(ii) Take any necessary and lawful action to prevent the occurrence of vectors, human discomfort from vectors, and vector-borne diseases.

(iii) Take any necessary and lawful action to abate or control vectors, human discomfort from vectors, and vector-borne diseases.

(b) The Director's exercise of the powers set out in this chapter is limited as to eye gnats as provided in chapter 4 of this division.

(c) The Director may undertake, fund, or contribute to the funding of research to identify additional or better methods to abate or control vectors, provided such research will be applicable to and beneficial to San Diego County.

(d) The Director may delegate such powers and responsibilities for vector control to the Director of the County Department of Agriculture, Weights and Measures as is mutually agreed between those Directors, provided that such delegations must be related to agricultural operations or to eye gnats generally. The Director shall transfer Vector Control Program funds to the Department of Agriculture, Weights and Measures as necessary to support any agreed vector control activities of that Department that are not supported by other fees and charges.

**Section 5.** Section 64.206 of the County Code is amended to read as follows:

**SEC. 64.206. NOTICE AND ORDER TO ABATE.**

(a) Whenever the Director determines that a public nuisance exists on property the Director may issue a Notice and Order to Abate to the property owner. Whenever the Director determines that a public nuisance exists in water the Director may issue a Notice and Order to Abate to the property owner or to any person or agency who controls the diversion, delivery, conveyance, or flow of water that is a breeding place for vectors. Whenever the Director determines that an activity is a public nuisance, the Director may issue a Notice and Order to Abate to the person conducting that activity.

(b) Notice to a property owner or other person or agency shall be served in the same manner as a summons in a civil action. If, after a diligent search, notice cannot be served in that manner notice shall be sent by certified U. S. mail

to the owner at the address shown on the County's current assessment roll, and shall also be posted in a conspicuous place on the property on which the public nuisance exists. If the property has no frontage the notice shall also be posted at a conspicuous location on the roadway closest to the property most likely to give actual notice to the property owner.

(c) The notice shall contain the following information:

(1) That the Director has determined that a public nuisance exists on the property, describing the nuisance and its location on the property.

(2) The date by which the property owner or other person or agency is ordered to abate the nuisance.

(3) Any action the property owner or other person or agency is ordered to take to prevent the recurrence of the nuisance.

(4) If the property owner or other person or agency fails to comply with the notice and order within the time specified the Director has the right to take the action ordered and the owner or other person or agency may be liable for paying the County's costs to abate, including the County's administrative costs.

(5) If the property owner or other person or agency fails to comply with the notice and order within the time specified the owner may be liable for civil penalties up to \$1,000 per day for each day the nuisance continues after the specified time.

(6) The property owner or other person or agency has the right to request a hearing by a date specified in the notice. The notice shall also advise the owner or other person or agency of the requirements for filing an appeal in section 64.207.

**Section 6.** Section 64.207 of the County Code is amended to read as follows:

**SEC. 64.207. APPEAL PROCEDURE AND FEE.**

(a) A property owner or other person or agency may appeal a Notice and Order to Abate by filing a written request for a hearing to the Clerk (Clerk) of the Board of Supervisors, stating the grounds for the appeal, contain the name, mailing address and telephone number of the appellant and be accompanied by the appeal fee.

(b) The fee to appeal a Notice and Order to Abate issued pursuant to this chapter shall be the same fee as the Board periodically establishes, based on the County costs incurred, to appeal a Notice and Order to Abate under the County Public Nuisance Abatement procedure in sections 16.201 et seq. If the hearing officer finds there is no public nuisance the Clerk shall refund the fee without interest.

(c) If the appellant claims an economic hardship in paying the appeal fee, the appellant may apply for a waiver of the appeal fee on forms provided by the Clerk for that purpose. The forms shall be substantially similar to those required of litigants initiating court proceedings in forma pauperis pursuant to Government Code section 68511.3. The appellant shall execute the forms under penalty of perjury and contain a declaration as to the truthfulness and correctness of the information contained in the forms that an appellant qualifies for a waiver under this section the Clerk shall allow the appeal to go forward without the appellant paying the appeal fee. If the appellant timely files an appeal and demonstrates good cause the Clerk may grant the appellant up to two additional days to complete and submit the waiver forms. If the appellant fails to timely submit the waiver forms or pay the appeal fee the appellant's request for appeal shall be automatically denied and the Director may enforce the order to abate as if the appellant did not submit an appeal request.

(d) When a property owner or other person or agency submits a timely request for appeal to Clerk, the Clerk shall set the matter for hearing, assign the appeal to a hearing officer by selecting a hearing officer on a rotating basis from the list of appointed hearing officers and provide at least ten days written notice to the appellant and the Director of the time, date and location of the hearing.

(e) A hearing under this chapter shall be conducted in the same manner as a hearing under section 16.209, except that the hearing officer shall also accept written testimony and may assign the appropriate weight to the written testimony based upon the hearing officer's determination as to the testimony's reliability.

(f) The request for hearing shall stay the effect of the Notice and Order to Abate until the time specified for compliance in the hearing officer's decision if the hearing officer upholds the notice and order.

**Section 7.** Section 64.208 of the County Code is amended to read as follows:

**SEC. 64.208. PRE-ABATEMENT HEARING.**

When conducting a hearing requested by property owner or other person or agency to contest a Notice and Order to Abate, the hearing officer shall determine whether the Director has demonstrated there is substantial evidence of a public nuisance and additional action is necessary to abate the public nuisance. At the conclusion of the hearing the hearing officer shall make written findings of fact and conclusions of law. The hearing officer's decision shall uphold or overrule, in whole or in part, the Director's determination that a public nuisance exists and whether additional action is necessary to prevent recurrence of the public nuisance. If the hearing officer determines the Notice and Order to Abate shall be enforced, the hearing officer shall determine a reasonable time for compliance and the decision shall specify a date by which the property owner shall comply. The hearing officer shall file the decision with the Clerk within seven days of the conclusion of the hearing. The hearing officer's decision shall be final when it is filed with the Clerk. The Clerk shall send the decision to the appellant by U.S. mail and provide a copy to the Director.

**Section 8.** Section 64.209 of the County Code is amended to read as follows:

**SEC. 64.209. NONCOMPLIANCE WITH NOTICE AND ORDER TO ABATE.**

(a) If the property owner or other person or agency fails to abate the public nuisance or take action to prevent the public nuisance from recurring within the time specified in the Director's order or the hearing officer's decision, whichever is applicable, the Director may abate the public nuisance and take whatever action is necessary to prevent the recurrence of the public nuisance. If the Director intends to recover the County's costs for the abatement the Director shall keep a separate account for the costs for each assessor's parcel involved in the Director's action.

(b) The Director may also impose a civil penalty up to \$1,000 a day for each day the property owner or other person or agency failed to comply. The Director shall apportion the daily civil penalty assessed among the parcels involved in the action, applying the same percentage to each parcel based upon the percentage of the County's costs incurred for each parcel.

**Section 9.** Section 64.211 of the County Code is amended to read as follows:

## **SEC. 64.211. RECOVERY OF COSTS AND CIVIL PENALTIES.**

(a) The Director may bill the property owner or other person or agency by U.S. mail to recover the County's cost in abating a public nuisance, taking other action to prevent the recurrence of the public nuisance and any civil penalties the Director assessed. If the property owner or other person or agency does not pay the bill within 15 days the Director shall request the Clerk of the Board schedule a hearing with a County hearing officer. With the request the Director shall submit to the Clerk an itemized written cost report including a copy of each invoice from each private contractor who performed any of the work included in the cost report.

(b) When the Director requests the Clerk of the Board schedule a hearing under this section the Clerk shall select a hearing officer and schedule a hearing in the same manner as provided in section 64.207(d). With the notice of hearing sent to the property owner, the Clerk shall include a copy of the Director's cost report.

**Section 10.** Chapter 4 is added to Division 4 of Title 6 of the County Code to read as follows:

## **CHAPTER 4. PREVENTION AND CONTROL OF EYE GNAT IMPACTS ASSOCIATED WITH COMMERCIAL ORGANIC FARMS**

### **SEC. 64.401. PURPOSE.**

Commercial organic farming operations located on or near an urban-rural interface can in some cases support the development, attraction or harborage of eye gnats in numbers that cause human discomfort in nearby communities. Eye gnats will not breed on all organic farms in numbers that cause human discomfort, but farms with sandy soil conditions that are cultivated and watered can breed high numbers of eye gnats. Eye gnats seek the eye, nose and mouth of humans and pets, and when they are present in large numbers they cause discomfort and can limit the activities of persons living or working nearby. There may be significant related economic harm.

Chapter 2 of this division defines “vector” to include eye gnats, and provides that the Director may exercise state law vector control district powers as to eye gnats except as provided in this chapter 4. This chapter limits and conditions the exercise of Vector Control Program powers as to eye gnats. This chapter does not limit the right of any person affected by an agricultural operation that is a nuisance to seek judicial abatement of that nuisance pursuant to the California Civil Code.



It is recognized that more research related to eye gnats and eye gnat abatement is necessary to identify additional best management practices and abatement measures that are compatible with the operation of organic farms in San Diego County.

## **SEC. 64.402. DEFINITIONS.**

The definitions set out in chapter 2 of this division shall apply to this chapter. In addition:

(a) “Abatable source” means any property that supports the development, attraction or harborage of eye gnats in numbers that cause human discomfort.

(b) “Applicable eye gnat abatement measure” means a validated eye gnat abatement measure that is technically suited to a crop or crops and to conditions and practices at a specific commercial organic farm, and that would reduce eye gnat development, attraction, harborage, or off-farm flight if used at that farm.

(c) “Barrier crop” means plants grown in a specified area for the purpose of intercepting eye gnats, which can be treated with conventional pesticides. (Barrier crops treated with pesticides can be used by farmers on a voluntary basis, but the Director cannot order that they be used.)

(d) “Commercial organic farm” means a farm that grows and sells certified organic products.

(e) “Cultural control method” means any farming practice that is selected at least in part to reduce or prevent eye gnat development, attraction or harborage.

(f) “Eye gnat breeding hazard” means an avoidable or mitigable condition on a commercial organic farm that is likely to contribute to the development of eye gnats in numbers that could contribute to a nuisance in a nearby community.

(g) “Eye gnat source identification testing” means any reliable technical method for determining whether a farm or other property is developing, attracting or harboring eye gnats, and includes but is not limited to emergence trapping on the farm or other suspected sources, grid trapping to determine concentrations of

eye gnats in the vicinity of the farm, and the use of trap count patterns to determine whether eye gnat populations are greater closer to the farm or other property than further away.

(h) “Grower” or “farmer” means any person who can direct changes in practices on a commercial organic farm.

(i) “Last resort situation” means a public nuisance as defined in Chapter 2, for which a commercial organic farm alone is a predominant cause, which has not been abated within six months after the implementation of abatement measures by that farm pursuant to an agreed voluntary plan or abatement order. Where a commercial organic farm is a predominant cause of a public nuisance only in combination with other sources, a last resort situation does not exist until those other sources also take or are ordered to take abatement actions the Director determines are appropriate. Notwithstanding any other provision of this ordinance, the Director may also exercise the last resort powers described in section 64.403 where a farmer fails or refuses to participate in the voluntary plan process or fails or refuses to comply with a previously issued abatement order or approved voluntary plan.

(j) “Predominant cause” of a public nuisance means contributing more to the existence of that nuisance than other causes.

(k) “Validated eye gnat abatement measure” means any farming practice, cultural control measure, or other eye gnat abatement measure that has been reviewed as set out in section 64.405 and determined by the Director to be effective in some organic farming situations, and the following measures:

1. Reduced tilling of fresh or dry organic matter into soils
2. Barrier crops
3. Flight barriers
4. Trapping to intercept eye gnats or to reduce eye gnat numbers
5. Fallow or dry periods

(l) “Voluntary plan” means the written proposal submitted to the Director by an organic farm or other agricultural operation describing the owner’s or grower’s plan to control eye gnat breeding. The voluntary plan includes any changes requested by the Director and agreed to by the owner or grower.

#### **SEC. 64.403. SCOPE AND AUTHORITY; LIMITATIONS ON AUTHORITY.**

The Director may exercise the powers established in chapter 2 of this division except as otherwise provided in this chapter 4. The specifications and limitations set out below are generally applicable to the Director's use of state law vector control district powers and the powers established in chapter 2 to address eye gnats.

(a) The Director may enter into a stipulated order to abate with any person subject to this Chapter.

(b) The Director may not issue any order to abate eye gnats to a commercial organic grower unless the grower has been given a reasonable opportunity to implement the voluntary plan procedures set out in Section 64.404. After written notice to the farmer, who shall have 15 days to respond and a reasonable opportunity to cure the deficiencies specified in the notice, the Director can terminate the voluntary plan process and issue an order to abate if a grower does not participate in that process diligently and in good faith. When issuing that order, the Director shall state the deficiencies in diligence or good faith that were not cured.

(c) A new owner or operator of a commercial organic farming operation is not required to develop a new voluntary plan solely due to the conveyance of the farming operation, but if an approved voluntary plan or abatement order was in place for a specific operation prior to its transfer or sale, the new owner or operator will be subject to the requirements of the prior voluntary plan or order in accordance with this chapter, unless a new plan or order is approved by the Director.

(d) The Director may not order a commercial organic grower to use any pesticide to abate eye gnats, or to use any abatement measure that would cause the grower to lose certification as an organic grower for the affected field or crop. The Director may not order a commercial organic grower to cease organic farming operations, or to use any abatement measure that is not validated. Except as provided in subsection (g) of this Section, these limitations apply even in last resort situations.

(e) The Director may order a commercial organic grower to implement a flight barrier or trapping measure that the Director has determined would be an applicable and practicable eye gnat abatement measure for that farm even if

implementation of that measure would require the use of land on which organic crops could otherwise be grown.

(f) The Director may order a fallow period or non-irrigated period, unless the fallow period or non-irrigated period would prevent a crop from being grown, e.g., by precluding the completion of a crop cycle within the growing season.

(g) Except in a last resort situation, the Director may not order a commercial organic grower to limit or to cease organic production of a particular crop or type of crop. In a last resort situation, if validated eye gnat abatement measures applicable to a crop will not sufficiently abate eye gnat development, attraction or harborage associated with that crop, the Director may issue an order to limit or to cease growing that crop to the extent necessary (in combination with other measures) to abate the nuisance.

(h) Notwithstanding the limitations in this section and in section 64.405, in last resort situations the Director may order the use of eye gnat abatement measures without regard to practicability. The limitations in subsection (d) shall apply.

(i) Except in a last resort situation, the Director may not issue any order to abate eye gnats to a commercial organic grower if a voluntary plan that includes all validated and applicable eye gnat abatement measures has been fully implemented and is being maintained by the grower.

(j) If voluntary measures result in changed conditions such that the presence of nuisance conditions in the community can no longer be verified by County staff, taking available data, direct observations by staff, and evidence provided by the community into account, the Director shall advise the farmer concerning validated and applicable eye gnat control measures that should be used in the subsequent year to prevent the recurrence of a nuisance.

(k) The Director must review any abatement order in November of each year, or otherwise at the end of the eye gnat season, and determine the efficacy of that order and the need for an abatement order in the following year.

(l) This chapter does not limit or condition the authority of the Director to obtain an inspection warrant.

#### **SEC. 64.404. VOLUNTARY PLAN PROCEDURES.**

Prior to issuing an order to abate to a commercial organic grower, the Director shall provide the grower an opportunity to take effective action voluntarily. The procedures set out below apply.

(a) If the Director receives a substantial number of eye gnat complaints from a community near the farm, the Director shall investigate. The Director shall endeavor to complete this investigation within 30 days. If completion of the investigation is interrupted by seasonal or other factors, the investigation may resume when feasible without requiring new community complaints. The Director shall proceed with the process set out in this section if the investigation:

- i. Verifies through eye gnat source identification testing that the farm supports the development, attraction or harborage of eye gnats; and
- ii. Verifies through observations by County staff or through evidence provided by community members that nuisance conditions exist in the community; and
- iii. Determines through surveillance, eye gnat source identification testing or other testing whether other abatable sources of eye gnats in the area may also be, alone or in combination, a predominant cause of the development, attraction or harborage of eye gnats.

(b) If the conditions in subsection (a) are satisfied, the Director shall promptly contact the farmer, state that action to abate eye gnats is required under state law, and offer assistance to the farmer to undertake such action voluntarily.

(c) The assistance offered shall include consultation with the Farm and Home Advisor to assess the eye gnat problem on the farm and to identify eye gnat abatement measures that are likely to be effective and to be practicable for that farm. The Director shall inform the farmer that if the offer of assistance is accepted, the conclusions and recommendation of the Farm and Home Advisor will be shared with the Director. The farmer may retain independent scientific experts to consult on preparation of a voluntary plan.

(d) If the farmer agrees to accept assistance from the Farm and Home Advisor, the farmer shall have such time as specified by the Director, but not fewer than 60 days, to submit a voluntary plan for eye gnat abatement to the Director. The Director may extend the period for submission of this plan if an extension is requested by the Farm and Home Advisor.

(e) During development of the voluntary plan the grower and Farm and Home Advisor shall consider and discuss at least the following strategies: the management of weeds and crop residues, the selection of fertilizers, watering practices, soil covers, flight barriers, barrier crops, trapping strategies, fallow periods or non-irrigated periods. The voluntary plan shall address both the prevention of eye gnat breeding and the interception of eye gnats on the farm, and shall include both appropriate cultural control measures and other appropriate control measures.

(f) The voluntary plan must include a combination of validated measures applicable to and practicable for that farm that the Farm and Home Advisor, after consultation with any experts hired by the farmer, determines are likely to significantly reduce eye gnat development and migration from the farm. The plan may include additional eye gnat abatement measures that have not yet been validated. The plan shall include provisions for monitoring the effectiveness of control measures on the farm and in the community. Plans typically should cover a one year period, however, a two-year plan can be submitted to and approved by the Director if the Farm and Home Advisor advises the Director that the most significant eye gnat abatement measures in that plan will take two or more years to achieve the effects intended.

(g) The Director shall approve the plan as submitted if the Director determines that it is likely to be sufficient to alleviate nuisance conditions in the affected community, or if the Director determines that the plan includes all validated, applicable and practicable measures for that farm. If the Director does not respond to or approve a plan within 45 days of receipt of the plan, the plan shall be deemed to have been approved.

(h) The Director may approve any plan that the Director determines constitutes an appropriate effort for that farm that year.

(i) In the event the Director determines that the voluntary plan submitted will not adequately abate eye gnats, the Director after review with the commercial organic farmer may request modifications to the plan to incorporate additional validated, applicable and practicable measures. The Director shall provide written notice of any requested modification to the farmer. Additions can include requirements to use on-farm and offsite trapping strategies. If the submitted or modified plan includes providing traps and bait free of charge to affected residents, the Director shall inform recent and subsequent complainants that free traps and bait are available from the farmer.

(j) The Director may request that a plan be modified at any time if the plan requires clarification or refinement, or if additional eye gnat abatement measures are validated while that plan is in place, and those measures are determined by the Director to be applicable and practicable for that farm. In addition, the Director may request that the second year of a two year plan be modified if the success of that plan is in jeopardy because significant eye gnat abatement measures in that plan did not perform as anticipated in the first year of the plan.

(k) If a farmer declines to add additional measures to a voluntary plan as requested by the Director, the Director may issue an order to abate, subject to the limitations in section 64.403. The farmer may appeal the order to abate as set out in this chapter.

(l) If the approved voluntary plan is implemented by the farmer on a timely basis and if there is substantial and continuous conformance to that plan, the Director may not issue an order to abate eye gnats to that farmer during the remainder of the calendar year or years in which the plan was implemented. If substantial progress is made by the end of the plan period the Director after consultation with the Farm and Home Advisor and consideration of any input provided by experts hired by the farmer may approve a voluntary plan for an additional full calendar year. The Director can request modifications to any approved plan at any time to the extent provided in subsection (j) of this section.

(m) Whether to issue an order to abate after the first voluntary plan period (whether one or two years) is in the Director's discretion, subject to the limitations in section 64.403.

#### **SEC. 64.405. VALIDATED AND APPLICABLE EYE GNAT ABATEMENT MEASURES.**

Procedures for validating abatement measures in addition to the measures listed in Section 64.402(l), and for determining where they are applicable are set out in this section.

(a) Within one month of the effective date of this section, and approximately annually thereafter, the Director shall compile a list of eye gnat abatement measures that are candidates for validation. Candidate measures shall be limited to measures that have been tested for effectiveness under controlled conditions, or that have been observed to be effective by a qualified scientist in a farm or test farm setting. Candidate measures shall include on-farm measures that are compatible with organic farming, measures to address other sources of eye

gnat development, and measures to reduce eye gnat populations from all sources within affected communities. The Director shall consider input from the Farm and Home Advisor and any input provided by other qualified experts when compiling this list.

(b) The Director shall confer with the Farm and Home Advisor to determine for each candidate measure whether a scientific peer review process has been completed and supports the conclusion that an abatement measure is effective. If the Director determines that an abatement measure has been peer reviewed and is effective, the Director may validate that measure.

(c) Within three months of the effective date of this section and from time to time thereafter, the Director shall arrange for two or more Professors of Entomology or similarly qualified persons, not employed by the County, to review the effectiveness of candidate measures identified by the Farm and Home Advisor that have not been validated based on prior peer reviews. Where new information is available concerning the effectiveness of a previously validated eye gnat abatement measure, that information shall also be reviewed. If feasible, this accelerated informal peer review shall be conducted orally through questions posed to a representative of the Farm and Home Advisor in a forum that the public can observe. If a participating reviewer is unable or unwilling to participate in a public forum, the Director can accept and consider a written review by that Professor of Entomology or similarly qualified person. Any written review shall be made available to the public while it is being considered by the Director.

(d) Based on the advice of the Farm and Home Advisor and the reviewing Professors of Entomology or similarly qualified persons, the Director shall determine whether specific eye gnat abatement measures are likely to be feasible and effective, and in what circumstances. The Director shall validate only those measures that are sufficiently proven to warrant mandated use in one or more applicable situations. The Director may determine that additional eye gnat abatement measures are suited to implementation by the Vector Control Program or by others on a voluntary basis.

(e) Before issuing an order to abate to a commercial organic farmer, the Director shall determine in his sole discretion which validated eye gnat abatement measures are practicable and applicable to the farm and situation at issue. In making this determination the Director shall consider whether implementation at that farm is technically feasible or appropriate, whether a noticeable reduction in eye gnats is expected to result, whether costs are disproportionate to the benefits achieved, and other relevant factors. The Director may not require the submission of cost information or financial information by a farmer for consideration in



making this determination, but may consider any such information a farmer chooses to submit.

#### **SEC. 64.406. OTHER ABATEMENT.**

(a) Where eye gnat impacts to a community are jointly caused by a commercial organic farm plus other properties that develop, accumulate or harbor eye gnats, the Director shall consider whether to order the abatement of those other properties. The Director may also expend Vector Control Program funds to abate eye gnats on such properties.

(b) The Director may expend Vector Control Program funds for eye gnat monitoring and abatement measures in or near a community affected by eye gnats from a commercial organic farm, to assist in alleviating an eye gnat nuisance. The Director may not compel any specific property owner to accept the use of abatement measures on that owner's property, unless that property itself supports the development, attraction or harborage of eye gnats. The Director may consider the overall level of community acceptance of abatement measures deployed within that community in determining the eye gnat abatement measures which are appropriate to require a commercial organic grower to implement.

(c) The Director may include validated and applicable offsite eye gnat abatement measures in any order to abate eye gnats issued pursuant to this division. A grower ordered to deploy abatement measures offsite cannot be required to deploy such measures on land not owned by the grower, unless off-site property owners consent to that deployment without compensation by the grower.

(d) This chapter does not require the Director to abate or to order the abatement of other eye gnat nuisances in the vicinity of a commercial organic farm prior to requiring action by a commercial organic farmer.

## **SEC. 64.407. APPEALS AND PETITIONS.**

(a) Any order to abate eye gnats issued to a commercial organic grower may be appealed within 30 days of its initial issuance, or within 30 days before or after the first anniversary of its initial issuance, but not otherwise. All such appeals shall be heard by the Eye Gnat Abatement Appeals Board established in the chapter, rather than by a hearing officer, unless the grower elects when the appeal is filed or within 14 days thereafter to have the appeal heard by a hearing officer.

(b) An appeal of an abatement order shall only stay those terms of the appealed order that are more stringent than the voluntary plan or abatement order that was in place for the prior calendar year. Except as provided in this chapter, all other aspects of the appeals process are as set out in chapter 2 of this division.

(c) If the Director makes or requests modifications to a voluntary plan pursuant to subsections (i) or (j) of section 64.404 that a farmer believes are not appropriate, the farmer or the Director may petition the Eye Gnat Abatement Appeals Board for an advisory opinion. Petitions must be filed within 10 days. If an abatement order is subsequently issued, the time allowed for an immediate appeal of that abatement order shall be 10 days not 30 days.

(d) Appeals of civil penalties imposed on a commercial organic grower by the Director are governed by chapter 2 of this division, and shall be heard by a hearing officer.

## **SEC. 64.408. EYE GNAT ABATEMENT APPEALS BOARD — FORMATION.**

(a) The Board of Supervisors shall appoint five persons to serve on an Eye Gnat Abatement Appeals Board (EGAAB). Nomination and appointments shall be made as set out in the Administrative Code.

(b) The EGAAB shall choose a presiding officer for each appeal hearing or petition hearing that it conducts.

## **SEC. 64.409. EYE GNAT ABATEMENT APPEALS BOARD POWERS.**

(a) The EGAAB, or hearing officer if elected by the farmer pursuant to Section 64.407(a), shall have the authority to hear appeals of abatement orders issued by the Director to commercial organic farmers as provided in this section.

(b) When an appeal from an abatement order is heard, the EGAAB can determine whether an eye gnat breeding hazard exists and whether any applicable limitations on the issuance and scope of abatement orders set out in section 64.403, 64.404 and 64.405 have been violated. If any of these three legal requirements have not been met, the EGAAB can vacate or modify the order.

(c) When an appeal from an abatement order is heard and the farmer asserts that required abatement measures are not practicable for that farmer's operations, the burden of proof to show impracticability shall be on the farmer.

(d) The EGAAB can consider whether a commercial organic farm is the principle cause of an eye gnat public nuisance in a community, whether the measures required by an abatement order are likely to substantially alleviate that nuisance, whether those measures can be implemented at a reasonable cost, and whether it is reasonable for the farmer to bear any disruptions in farm operations the order would cause, taking into account the degree to which the surrounding community is participating in abatement efforts. The EGAAB cannot vacate or modify an order based on these considerations, but can advise the Director to modify an abatement order based on these considerations, including advising the Director concerning making the order more or less stringent.

(e) The EGAAB may advise the Director to take action to abate other sources of eye gnats it finds are contributing to an eye gnat public nuisance.

(f) Appeals shall be heard in public. Petitions pursuant to subsection (c) of section 64.407 may be heard informally or by teleconference. Advisory opinions in response to such petitions may be provided orally or in writing, on behalf of the Eye Gnat Abatement Appeals Board as a body or by each sitting member of that board individually.

(g) Three members of the EGAAB, including at least one farmer and one community representative, shall constitute a quorum. An action by the EGAAB requires a quorum to be present and except as provided in subsection (f) at least three concurring votes.

#### **SEC. 64.410. INSPECTIONS.**

The Director is authorized to inspect a commercial organic farm whenever the Director has reasonable cause to believe that a public nuisance or an eye gnat breeding hazard exists on that farm. If the Director receives a complaint implicating a commercial organic farm the Director shall also have the authority to inspect the surrounding area to confirm that the eye gnat breeding hazard does or

does not exist somewhere other than the commercial organic farm implicated in the complaint. Nothing in this section limits the inspection authority of the Director pursuant to state law.

#### **SEC. 64.411. STANDARDS FOR PREVENTION AND CONTROL OF EYE GNAT BREEDING.**

The Director shall maintain a list of the eye gnat abatement measures the Director has validated and a summary of his conclusions concerning the circumstances in which those measures are likely to be applicable. This information shall be updated as it changes, shall be available on the DEH web site or page, and shall be provided to commercial organic farmers and community members on request.

#### **SEC. 64.412. FARM AND HOME ADVISOR.**

The Director may apply vector control program funds to support work by the Farm and Home Advisor to implement this chapter, including funding research by the Farm and Home Advisor. The Director may also fund work by the Farm and Home Advisor to address situations with the potential to become community eye gnat nuisances, including outreach to help farmers identify and mitigate those situations.

#### **SEC. 64.413. SUNSET REVIEW.**

This chapter and the definition of “vector” in chapter two shall be subject to initial sunset review not later than three years after enactment, and thereafter shall be reviewed as part of this Title under the schedule applicable pursuant to Board Policy A-76.

**Section 11:** This ordinance shall take effect and be in force thirty days after its passage and before the expiration of fifteen days after its passage, a summary hereof shall be published once with the names of the members of this Board voting for and against it in the San Diego Commerce, a newspaper of general circulation published in the County of San Diego.

APPROVED AS TO FORM AND LEGALITY  
COUNTY COUNSEL  
BY  
Rodney F. Lorang, Senior Deputy